

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK**

LEROY PEAK,

Plaintiff,

v.

**9:11-CV-0041
(MAD/DEP)**

SCHWEBLER, et al.,

Defendants.

APPEARANCES:

OF COUNSEL:

LEROY PEAK

92-B-1880

Plaintiff, *pro se*

Clinton Correctional Facility

P.O. Box 2002

Dannemora, New York 12929

HON. ERIC T. SCHNEIDERMAN

New York State Attorney General

The Capitol

Albany, New York 12224

Attorney for Defendants

DEAN J. HIGGINS, A.A.G.

MAE A. D'AGOSTINO, United States District Judge

DECISION AND ORDER

Plaintiff Leroy Peak commenced this civil rights action *pro se* in January, 2011, asserting claims pursuant to 42 U.S.C. § 1983 arising out of his confinement at Cocksackie Correctional Facility ("Cocksackie C.F."). After initial review of the complaint, in a Decision and Order filed May 19, 2011, the Court dismissed several claims and Defendants from Plaintiff's complaint, and service was directed upon the four remaining Defendants, all employees of Cocksackie C.F. *See* Dkt. No. 7. An answer to the complaint was filed by Defendants in August, 2011. *See* Dkt. No. 18. Shortly thereafter, Magistrate Judge David E. Peebles issued a Mandatory Pretrial Discovery and Scheduling Order. *See*

Dkt. No. 19. In January, 2012, Defendants took Plaintiff's deposition, and discovery closed on January 30, 2012. *See* Dkt. Nos. 24; Text Order dated December 22, 2012. On April 30, 2012, Defendants filed a motion for summary judgment. *See* Dkt. No. 27.

Plaintiff did not respond to the motion for summary judgment before the time to do so expired. On May 16, 2012, Plaintiff filed a motion to voluntarily dismiss this action stating:

I do not wish to pursue this law suit any farther. I just want to finish doing my time and be left alone without being retaliated against. Sir I was going to write and ask for an extension [of time to respond to the summary judgment motion] but I said I just want to put this all behind me.

See Dkt. No. 29 at 1. Plaintiff did not indicate whether he requested the dismissal to be with or without prejudice. Defendants responded to the motion, indicating that they did not oppose Plaintiff's motion as long as the dismissal was with prejudice. *See* Dkt. No. 30. Defendants claimed that "they would be prejudiced unless a 'with prejudice' dismissal is granted." *See id.*

In a Decision and Order filed September 17, 2012, the Court reviewed Plaintiff's motion for voluntary dismissal and Defendants' response in conjunction with relevant Second Circuit precedent applicable to whether voluntary dismissal should be with or without prejudice. *See* Dkt. No. 31. The factors are more fully set forth in the September Order, and will not be repeated here. *See id.* at 3-5.

After considering the factors, the Court concluded that a dismissal "without prejudice" would be improper at this late stage of the proceeding, where discovery was complete, and a motion for summary judgment is pending. *See id.* at 5. Thus, the Court advised Plaintiff that this action would be dismissed with prejudice pursuant to his motion to discontinue the action unless Plaintiff notified the Court and Defendants within twenty days from the filing date of September Order, that he objected to the dismissal with prejudice. *See id.* at 5-6. If after twenty days Plaintiff did not object to the

dismissal of this action with prejudice, Plaintiff's motion for voluntary dismissal would be granted, and this action would be dismissed with prejudice, without further order of this Court.

In a letter dated September 27, 2012, Plaintiff indicated that he objects to the dismissal with prejudice, that he would like to proceed with this case, and requests that the Court grant him an extension of time to respond to Defendants' motion for summary judgment. *See* Dkt. No. 32. Thereafter, Plaintiff filed his response to Defendants' motion for summary judgment. *See* Dkt. No. 33.

In light of the foregoing, the Court denies Plaintiff's motion for voluntary dismissal (Dkt. No. 29). Moreover, the Court finds that, in light of the fact that Plaintiff has already filed his response to Defendants' motion for summary judgment, his request for an extension of time (Dkt. No. 32) to respond to the motion is denied as moot.

WHEREFORE, the Court hereby

ORDERS that Plaintiff's motion for voluntary dismissal (Dkt. No. 29) is **DENIED**; and the Court further

ORDERS that Plaintiff's request for an extension of time (Dkt. No. 32) is **DENIED as moot**; and the Court further

ORDERS that Defendants' reply to Plaintiff's response shall be filed by November 16, 2012; and the Court further

ORDERS that the Clerk of the Court shall serve a copy of this Decision and Order on the parties in accordance with the Local Rules.

IT IS SO ORDERED.

Dated: November 9, 2012
Albany, New York


Mae A. D'Agostino
U.S. District Judge